

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SALVADOR MARTINEZ

Claimant

VS.

CARGILL MEAT SOLUTIONS CORPORATION

Self-Insured Respondent

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Docket No. 1,027,953

ORDER

Respondent appeals the February 17, 2010, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded a 21 percent permanent partial whole person disability for a series of injuries suffered to his upper extremities and cervical spine.

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. The self-Insured respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 2, 2010.

ISSUE

What is the nature and extent of claimant's impairment and disability? Claimant alleges an accident arising out of and in the course of his employment beginning January 19, 2005, and each and every day thereafter. Respondent argues that claimant should be limited to medical treatment for a trigger finger on his right hand, but, otherwise, be awarded no permanent disability compensation. In the alternative, respondent argues that claimant's disability is a natural consequence of the left arm amputation suffered on June 23, 2004. Therefore, the \$50,000.00 limit contained in K.S.A. 44-510f(a)(4) should apply. Claimant argues that the award of the ALJ should be affirmed as the most credible medical opinion in this record is that of Dr. Murati that claimant has suffered a 21 percent permanent partial whole body disability to his upper extremities and neck and that these injuries are the result of a new series of accidents and are not the direct and natural consequence of the amputation of claimant's left forearm.

FINDINGS OF FACT

Claimant, a working supervisor, had worked for respondent for 11 years. On June 23, 2004, while he was working on "high line 2", claimant's left arm became entangled in a chain which pulled his arm into a machine, breaking his arm between his wrist and elbow. Claimant was taken to the hospital by ambulance and later transferred to St. Luke's Medical Center in Denver, Colorado. It was determined that the arm was too badly damaged to save and claimant underwent an amputation of his left arm approximately 3 to 4 inches below his elbow. Claimant was off work for almost four weeks, returning to light duty in the yard for two to three weeks. Claimant was then returned to his job on the "high line 2" as a supervisor. After about a year, claimant transferred to a supervisor's job in the area called "case ready Wal-Mart". Claimant remained at that position at the time of the regular hearing.

The transfer from "high line 2" to "case ready Wal-Mart" occurred after claimant began experiencing pain in his shoulders. Claimant's job on "case ready Wal-Mart" required that he supervise only, most of the time. However, if claimant's crew was short handed, he would then become a worker on the line. The "high line 2" job was more physical than the "case ready Wal-Mart" position because it required operating more equipment, and using knives and hooks to perform the work.

After the initial amputation surgery, claimant underwent two more irrigation and debridement procedures to the left forearm. Claimant later returned to Denver to have his prosthetic left arm fitted. After the initial surgery, claimant returned to Dodge City and came under the care of Dr. Shah. At some point, claimant began experiencing left shoulder pain with a possible diagnosis of bicipital tenosynovitis. Claimant was placed on Celebrex and his exercises to the left shoulder were reduced. Claimant also underwent a period of psychotherapy and was taking antidepressants. This treatment proved successful. Claimant displayed good range of motion in the left elbow and shoulder. The September 11, 2009, report of board certified orthopedic surgeon John P. Estivo, D.O., discussed a rating from Dr. Shah to claimant's left upper extremity of 95 percent.

By January 19, 2005, claimant was experiencing pain in both shoulders, with the pain in the right shoulder being the worst. The pain in his left shoulder went to his elbow. Claimant returned to Dr. Shah and indicated that he had been using his prosthetic left arm. Claimant had shoulder pain with range of motion bilaterally. X-rays indicated possible impingement syndrome of both shoulders, possibly from overuse, and possible hypertrophy of the rotator cuffs causing some bursitis. Cortisone injections to both shoulders were administered, and claimant was again placed on Celebrex. Claimant's pain complaints extended into the neck and radiated down his right forearm. Claimant also experienced pain in his right hand and underwent injections in the fingers of the right hand and one injection in his right elbow. Claimant testified that the use of the prosthetic arm when

working caused him pain in the left elbow and in his neck, extending down his right arm. Claimant acknowledged that he was having to use his right hand more since he underwent the amputation to his left arm. Claimant also testified that the amputation caused added stress on his left shoulder due to the need to compensate for the loss of his left arm.

Claimant was referred by his attorney to board certified rehabilitation and physical medicine specialist Pedro A. Murati, M.D., for an initial examination on June 6, 2006. Dr. Murati determined that claimant was experiencing a cause-and-effect relationship between the amputation of the left arm and the subsequent injuries to his upper extremities, neck and upper back. When asked, Dr. Murati was unable to state that “but for” the amputation, claimant would not have had the additional problems. But, he could state that the amputation did help make everything significantly worse. However, Dr. Murati also testified that the return to a job requiring repetitive activities would increase the likelihood that claimant would experience difficulty with his shoulders. The return to repetitive type duties would aggravate claimant’s upper extremity conditions. Claimant was diagnosed with post amputation status, myofascial pain syndrome affecting the bilateral shoulder girdles and cervical paraspinals, right lateral epicondylitis, right carpal tunnel syndrome and right radial nerve entrapment at the elbow. Dr. Murati rated claimant at 95 percent impairment to the left upper extremity for the amputation, 5 percent whole person impairment for the myofascial pain syndrome affecting the cervical paraspinals, 10 percent impairment to the right upper extremity for the carpal tunnel syndrome, 10 percent impairment to the right upper extremity for the radial elbow entrapment, 3 percent impairment to the right upper extremity for the lateral epicondylitis, for a 21 percent right upper extremity impairment, which converts to a 13 percent whole person impairment. (It is noted that the 5 percent impairment for the cervical paraspinals myofascial pain syndrome appears to have been omitted when the numbers were combined in Dr. Murati’s June 6, 2006, report.)

Dr. Murati next examined claimant on April 1, 2008. The diagnoses remained the same with the exception that myofascial pain syndrome affecting the thoracic paraspinals was added. The impairment ratings also remained the same with the exception that a 5 percent whole person impairment for the myofascial pain syndrome affecting the cervical paraspinals and a 5 percent whole person impairment for the myofascial pain syndrome affecting the thoracic paraspinals were added. The ultimate impairment calculated to a 21 percent whole person impairment with both the cervical and thoracic ratings included in the final calculation.

Claimant was referred by respondent to family and occupational medicine specialist Terry R. Hunsberger, D.O., on June 12, 2008. In his practice, Dr. Hunsberger sees patients at respondent’s plant once per week, and has been doing so for four to five years. Claimant was diagnosed post amputation and also displayed upper extremity symptoms from repetitive activities on the job. Claimant had complaints in his upper extremities, his shoulders, his right elbow, his neck and his upper back. Dr. Hunsberger opined that claimant’s upper extremity, neck and shoulder complaints would not have occurred “but for”

the amputation of his left hand.¹ However, Dr. Hunsberger also acknowledged that the return to repetitive activities after the amputation injury contributed to claimant's conditions. He further defined his opinion in stating that the repetitive activities that claimant was performing since his injury probably caused the conditions claimant was experiencing.² Dr. Hunsberger discussed bilateral impingement and hypertrophied rotator cuffs with bursitis and myofascial pain syndrome. He provided no rating for claimant's conditions but did testify that the ratings should not be a body as a whole rating due to the fact that claimant's right shoulder was not injured at the same time as the left upper extremity.

Claimant was referred by respondent to board certified orthopedic surgeon John P. Estivo, D.O., for an evaluation on September 11, 2009. At the time of the evaluation, claimant was experiencing complaints to his right hand and right index finger with triggering in the finger. Claimant had no cervical pain, no radiating pain to the upper extremities, no left shoulder or elbow pain, no right elbow or wrist pain and no lumbar or thoracic pain. Dr. Estivo performed a series of tests on claimant, including a Spurling's test, all of which were normal. Claimant had a negative Tinel's test at the right elbow, had a negative Tinel's test at the right wrist and displayed no intrinsic muscle wasting to his right hand. Claimant had a full range of motion in the right hand, and testing for de Quervain's tenosynovitis was negative. Range of motion studies in the right and left shoulders, right elbow, lumbar spine and cervical spine were all normal. Dr. Estivo rated claimant at 95 percent to the left upper extremity for the amputation but provided no other impairment rating for claimant's other body parts. He did note that claimant's symptoms continued to increase as he continued to work. Dr. Estivo also acknowledged that his evaluation of claimant was drastically different from the evaluations performed over the past approximately four years by other medical providers.

Claimant came under the care of Ara Chitchyan, M.D., on January 13, 2009. Dr. Chitchyan is employed at Amputee Services of America in Denver, Colorado. He has been employed there since July 2008. He is not board certified, but is board eligible and has completed the first stage of the certification in physical medicine and rehabilitation. Claimant presented with bilateral shoulder pain, right elbow pain, right hand pain and paresthesia in the right hand. Claimant brought several MRIs which covered claimant's bilateral shoulders and neck. Claimant was diagnosed with cervical spondylosis, showing significant progression between 2006 and 2008, myofascial pain syndrome for the cervical spine, right hand trigger finger and paresthesia in the right hand. Claimant was referred for physical therapy and, at one point, was referred for psychological counseling. Dr. Chitchyan opined that claimant's work was too hard for him and that claimant was working outside his restrictions due to pride in his job. Dr. Chitchyan was not under the impression that respondent was making claimant work outside his restrictions, only that

¹ Hunsberger Depo. at 6-7.

² *Id.* at 14.

claimant was choosing to do so. Regardless of why, claimant was working too hard and the aggravation was making his physical situation worse.

When Dr. Chitchyan examined claimant on September 29, 2009, he determined that claimant's condition continued to deteriorate, with pain in his right shoulder and hand. The worsening was accelerated as compared to a regular aging process. Dr. Chitchyan did not testify that claimant should not be a supervisor, only that he was performing duties which went beyond his duties as a supervisor. He performed no evaluation of the left upper extremity as claimant was still under the care of Dr. Meier. These repetitive activities were going to aggravate and accelerate claimant's conditions. Claimant had no complaints in his lumbar spine at the time of the examination. Dr. Chitchyan did not offer a rating under the *AMA Guides*.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

³ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 44-501(a).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

Dr. Hunsberger opined that claimant’s upper body injuries would not have occurred “but for” the amputation. However, he went on to state that the repetitive activities resulting from claimant’s return to work for respondent were partly to blame for these upper body injuries.

Dr. Estivo found claimant to have only a trigger finger on the index finger of his right hand. This, despite the fact that every other health care provider to examine claimant found upper extremity, shoulder, neck and/or upper back problems from claimant’s work with respondent. The Board does not find the limited evaluation of claimant by Dr. Estivo to be persuasive.

Dr. Chitchyan found claimant to be suffering from bilateral upper extremity problems, including the shoulders, right elbow pain and neck pain. He determined that claimant was suffering these problems due to claimant’s willingness to exceed his restrictions at work. Claimant’s conditions were made worse by the job and not due to just regular aging. The conditions were more accelerated from the job as compared to the regular aging process.

Dr. Murati testified that claimant was causing himself problems due to the overcompensation for the loss of his left arm. However, if claimant had not returned to work, and if he had been able to avoid repetitive activities, it would be highly improbable that claimant would have ended up this bad. Claimant’s difficulties can be attributed to the fact that he went back to repetitive type duties. These repetitive duties aggravated claimant’s conditions.

It is well established under the Workers Compensation Act in Kansas that when a worker’s job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁷

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.⁸

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁸ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

The Board finds the majority of the evidence in this matter points to a new series of accidents occurring after claimant returned to work from the amputation injury. Claimant performed repetitive activities which contributed to the development of upper extremity and cervical injuries. While these injuries do display some connection with the left upper extremity amputation injury, the medical evidence in this record supports a finding that claimant also suffered a series of new traumas from the repetitive nature of his job. This new series of injuries began on January 19, 2005, and continued throughout claimant's ongoing employment with respondent.

The Board also finds the opinion of Dr. Murati that claimant has suffered a 21 percent whole person disability from these injuries is the most credible opinion in this record. The adoption of Dr. Murati's rating by the ALJ and the award of the ALJ are affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has proven that he suffered a series of accidental injuries beginning January 19, 2005, and thereafter. The Award of the ALJ is affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated February 17, 2010, should be, and is hereby, affirmed.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.⁹

IT IS SO ORDERED.

⁹ K.S.A. 44-536(b).

Dated this ____ day of June, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge